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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
	)	
Treatment of Operator Services Under Price Cap Regulation	)	CC Docket No. 93-124
	)	
	)	
Revisions to Price Cap Rules for AT&T	)	CC Docket No. 93-197

To the Commission:

REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA" or "Association"), by its attorneys, and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Reply Comments in response to the Second Further Notice of Proposed Rulemaking in CC Docket No. 94-1, the Further Notice of Proposed Rulemaking in CC Docket No. 93-124, and the Second Further Notice of Proposed Rulemaking in CC Docket No. 93-197 (collectively, the "FNPRM") released September 20, 1995 and the initial comments filed in this proceeding.

I. INTRODUCTION

The comments that have been filed in this proceeding represent polarized views of the issues presented in the FNPRM. Proponents of the primary opposing viewpoints -- the price cap local exchange carrier ("LEC") interests, on the one hand, and the non-LEC commenters, including local customers, purchasers of access services, and potential and existing competitors of the LECs, on the other -- seem to base their respective submissions on two entirely different sets of facts and assumptions, so divergent are the views presented.

In sifting through the substantial volume of material that has been and will be presented in this proceeding, the Commission should consider the underlying interests of each commenter, what pecuniary or other interests may be potentially benefitted and potentially harmed by the proposed reforms (and to what extent), and finally and most importantly, which views most closely represent the "public interest" which the Commission was chartered to protect.[1] After close examination, it will become apparent that the positions taken by the LEC commenters reflect only their own self-interest in maximizing profits, limiting competition, and preserving their market power. Adoption of the positions advanced by the LEC commenters would disserve the public interest and benefit only the price cap LECs; therefore, for the most part, those positions should be rejected.

II. ARGUMENT

A. The Vast Majority of Non-LEC Commenters Opposes Granting Pricing Flexibility Without a Showing of Actual Competition in Relevant Markets.

Perhaps the core issues presented in this proceeding are whether the proposed relaxation of price cap regulation should be conditioned on a showing of competition in the relevant LEC product and geographic markets, and if so, whether sufficient competition exists in any of those markets to justify granting such relief today. On these issues, the consensus of the non-LEC commenters is clear: No regulatory relief should be granted in the absence of a showing of meaningful actual competition in the product and geographic market for which

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[1] As the Commission has properly recognized, "[i]n considering possible revisions to the LEC price cap plan, our primary goal will be to maximize the benefits of the plan to consumers and society, in accordance with the purposes and requirements of the Communications Act." Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, First Report and Order, 10 F.C.C. Rcd. 8961 (1995) at ¶ 93.

relaxed regulation is proposed; and insufficient competition currently exists in the LECs' markets to justify relaxing regulation in any of those markets at this time.

TRA and the other non-LEC commenters have presented substantial evidence in the initial comment round documenting the virtual absence of competition from LEC geographic and product markets. Such evidence need not be restated here, but it provides a stark contrast to LEC doomsday predictions of the imminent threat of emerging competition to their survival.

In reality, meaningful competition does not now exist, nor will it ever exist unless the Commission refrains from granting the LECs regulatory relief until competition has had an opportunity to take root. If the Commission relaxes regulatory safeguards at this point, it will practically guarantee that competition for traditional LEC services will never exceed the meager levels existing today, since the LECs will wield their new flexibility to stifle competition through predatory pricing, cross-subsidization of competitive services with revenues from monopoly services, and price squeezes of potential competitors that must purchase LEC services to compete.

The odds that these predictions will materialize if the proposed relaxation of regulation is adopted in the absence of competition are worth betting on, since the LECs' track record of anticompetitive behavior, even under a regulatory system designed to restrict such behavior, indicates the likelihood that they will act even more anticompetitively if given the opportunity in the form of lightened regulatory scrutiny, as explained in greater detail in Section D, below.

B. A Competitive Checklist Should Be Adopted, But Market Share Should Be the Determinative Factor in Evaluating Whether the LECs Face Meaningful Competition At Levels Justifying Relaxed Regulation.

The Commission has requested comment on the criteria that it should use to measure the extent of competition in various LEC product and geographic markets if it determines that any

or all of its proposed regulatory reforms should be conditioned on a showing of competition. As with the other critical issues presented, the LEC parties and the non-LEC commenters are 180 degrees apart.

The position taken by TRA in its initial Comments, and urged again here, is representative of the non-LEC position:[2] The level of competition should be measured primarily by reference to market share, since that factor is the most reliable indicator of *actual*, rather than merely *potential*, competition. As one commenter in this proceeding noted,[3]

> [t]he ultimate indicator of whether a LEC faces real, rather than hypothetical, competition is whether potential competitors have gained and currently hold significant market share. . . . Market share reflects consumers' actual purchasing decisions and thus provides stronger evidence of the degree to which competitors have successfully entered the market, attracted customers, and retained customers than do the other criteria identified in the NPRM.

Although supply and demand elasticities are useful factors to consider, they should not, as proposed by the Commission and the LEC parties, be relied on as the primary indicia of competition. Demand elasticities might be a reliable measure of competition in the interstate interexchange market because residential subscribers generally select only one long-distance provider; but in the case of local service, consumer demand for additional sources of supply may reflect only a demand for sources of redundancy, or supplemental service, not demand for alternative providers in lieu of the incumbent LECs.

Supply elasticities are even less reliable indicators of competition in the local exchange/exchange access market. While competing or potentially competitive providers may

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[2] *See, e.g.*, Comments of Time Warner Communications Holdings, Inc., in this proceeding (filed December 11, 1995) ("Time Warner Comments") at 33, 51, 55-57.

[3] Time Warner Comments at 55.

possess substantial capacity to handle customer demand, if other barriers to competitive entry exist, such as a lack of number portability or lack of unbundled local network elements, then the capacity may go untapped and not indicate the presence of competition. Nor should LEC pricing practices be accorded significant weight in the analysis, as a trend toward lowering rates could as much indicate a practice of cross-subsidization or predatory pricing to block emerging competition (TRA's view) as it could indicate a *bona fide* response to competition (the Commission/LEC view).[4]

The positions of the LEC parties in this regard provide a vivid illustration of the overambitious, singleminded efforts to protect their monopoly power and to mesmerize the Commission into abdicating its statutory responsibility to protect the public interest in the process. For example, the United States Telephone Association ("USTA") has proposed that the LECs should be accorded relaxed regulation without regard to competition. It has also proposed that LECs receive streamlined regulation when a market is deemed competitive, as measured by demand and supply elasticities, and that a market should be deemed competitive when a mere 25% of the potential customer population has at least one alternative provider available -- *not* when the competitor has a 25% market share. In addition, it has proposed that a price cap LEC be accorded nondominant status when 50% of the LEC's customers have at least one alternative provider available (*not* when the provider has a 25% market share) and when the LEC is in compliance with state requirements for opening local exchange service to competition. Such proposals can not be taken seriously.

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[4] Other commenters have echoed this view. *E.g.,* Time Warner Comments at 57-58.

Instead of wish lists of the type proposed by the LEC commenters, a reliable, meaningful competitive checklist should be adopted to aid in the measurement of competitive conditions, as proposed by TRA in its initial Comments. Such a checklist, however, should reflect the difference between elimination of barriers to potential competition, and factors indicating the presence of actual competition. The latter might justify relaxed regulation of one-time monopolists; the former would surely not.

C. The Commission's Assumption that Granting Pricing Flexibility Will Encourage the LECs to Lower Their Rates Toward Costs Is Ill Founded.

The keystone of the Commission's proposal to grant increased pricing flexibility to the price cap LECs without a competitive showing is the assumption that the grant of such relief would inspire the LECs to price their services closer to costs. FNPRM at ¶ 37. This assumption is misplaced, and is contradicted by actual experience. Before the Commission can conclude that relaxed regulation will serve the public interest by motivating the price cap LECs to price their services closer to costs, the Commission must, as a matter of administrative law, find support for its underlying assumption in the record. That will be impossible, as the record in this proceeding does not support such an assumption.

One of the premises of the erroneous assumption is that the existing price caps regulatory system inhibits the LECs from pricing services subject to such regulation closer to costs. This is false. There is no impediment to the LECs' pricing their services at or just above the costs of providing those services. Under the existing price cap regulatory system, the LECs could lower their rates today for regulated services to economic cost if they so desired. The price cap LECs already can lower rates annually within downward bands of 5%, 10%, and 15%, depending on the service category, with only 14 days' notice and a presumption of legality.

Even greater rate decreases are permitted as long as the LECs ensure that the rates remain above the average variable costs of the services involved.

Although the price cap LECs are able to lower their rates toward costs within the existing regulatory system, they have failed to do so. According to MCI, "few LECs have ever filed rates that reduce service category prices below the price 'band,' and none have seriously tested the lower boundary of average variable cost."[5]

The LECs' rates for switched access services significantly exceed the underlying costs of such services and exceed other LEC rates for comparable uses of the same local network facilities.[6] By way of illustration, MCI notes that the Commission has required the LECs to set switched transport rates at the level of special transport, since the latter more closely reflected the economic cost of providing transport, resulting in a 70% reduction in switched transport rates.[7] Furthermore, although the industry-wide economic cost of providing local loop and switching services exceeds industry-wide revenues from local charges (averaging $20 per month) by only $4 billion, the interstate carrier common line and local switching charges recover almost

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[5] Comments of MCI Telecommunications Corporation in this proceeding (filed December 11, 1995) ("MCI Comments") at 7. MCI claims that LEC rate decreases have tended to remain within the bands because when they lower the rate for one service, the LECs raise the rate for another service within the same category. *Id.*

[6] *See* Comments of the Competitive Telecommunications Association in this proceeding (filed December 11, 1995) ("CompTel Comments") at 5-8 & accompanying notes (citing evidence that LECs' rates for switched access are priced "grossly above cost"), 16-18 (citing evidence that LECs discriminate in rates charged to different categories of customers for similar services); MCI Comments at 5 ("the LECs' true economic cost for providing access services is well below the current rates"); Comments of AT&T Corp. in this proceeding (filed December 11, 1995) ("AT&T Comments") at 5 ("LEC access prices substantially exceed their economic cost").

[7] MCI Comments at 5.

$7 billion, according to evidence provided by MCI.[8] And the Commission has found that, rather than reducing rates, the LECs have established excessively high or unreasonably discriminatory rates, when faced with limited actual competition.[9]

Thus, any suggestion that relaxed regulation would compel the LECs to lower rates toward costs in the absence of competition is untenable in light of experience.

D. The LECs Have Demonstrated the Propensity and Ability to Act Anticompetitively to Thwart Competition and Should Not Be Expected To Act Differently If Granted Regulatory Relief.

In their initial comments, TRA and other non-LEC parties brought to the Commission's attention a number of significant advantages that the incumbent LECs possess over potential competitors and that further call into question the need for relaxed regulation of the incumbent LECs at this juncture. The LECs control bottleneck facilities due to the former government imprimatur of their monopoly power. In addition, as one of the Regional Bell Operating Companies ("RBOCs") itself admitted,[10] the incumbent LECs bring

> enormous structural advantages to the competition in the form of a "paid-for" infrastructure, name recognition, brand loyalty, consumer inertia, preferential access to data regarding the calling habits of its interconnecting competitors' costumers, superior access to infrastructure, established regulatory/legislative relationships, etc.

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[8] MCI Comments at 5 & note 8.

[9] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, 4 F.C.C. Rcd. 8634 (1989) *recon.*, 5 F.C.C. Rcd. 4842 (1990); Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, 10 F.C.C. Rcd. 6375 (1995) at 6376-77.

[10] Comments of BellSouth Europe to the European Commission's Green Paper on the Liberalization of Telecommunications Infrastructure and Cable Television Networks (March 15, 1995) at 5 (quoted in Comments of MFS Communications Company, Inc. in this proceeding (filed December 11, 1995) ("MFS Comments") at 4).

Moreover, the LECs assess competitive access providers ("CAPs") and other would-be competitors that depend on interconnection with LEC facilities high rates for virtual collocation of competing facilities with those of the LECs, rates which the LECs do not assess on themselves, thereby conferring on the incumbent LECs a fundamental cost advantage over competitors.

In addition to, or perhaps because of, these competitive advantages, the incumbent LECs have been anything but cooperative with regulators' efforts to spur competition for LEC services. Indeed, the LEC industry has amassed an impressive record of anticompetitive actions that can not reasonably be expected to disappear if regulatory checks on such actions are removed or lightened. Rather, such abuses can only be expected to multiply.

As a potential competitor of the LECs noted in its initial comments, the LECs have repeatedly discriminated against that provider by denying its frequent requests for volume discounts for expanded interconnection services, while giving large discounts to the LECs' preferred customers for high capacity services who are not potential competitors of the LECs.[11]

Another commenter in this proceeding provided anecdotal evidence of serious anticompetitive conduct by two of the RBOCs, Ameritech and NYNEX, in which those LECs leveraged their control of bottleneck facilities to hamper the growth of their competitors.[12] Because of the LECs' history of such abuses, TRA and other commenters have proposed that

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[11] MFS Comments at 4-5.

[12] Comments of the National Cable Television Association in this proceeding (filed December 11, 1995) ("NCTA Comments") at 12-18.

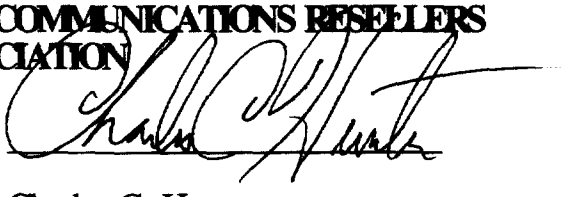
the Commission give due consideration in compiling its competitive checklist to any anticompetitive behavior by the LECs.

III. CONCLUSION

The Telecommunications Resellers Association urges the Commission to proceed with extreme care in this proceeding, and it emphasizes the need to establish the existence of meaningful, actual competition before existing regulation of the price cap LECs is relaxed.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

By: 

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